

June 16, 2003

**Barbara A.
Schermerhorn
Clerk**

NOT FOR PUBLICATION
**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE CRESTVIEW FUNERAL HOME,
INC., doing business as Crestview Florist,

Debtor.

BAP No. NM-02-070

JOHN LESTER SALAZAR,

Plaintiff – Appellant,

v.

JAMES A. MCCORMICK,

Defendant – Appellee.

Bankr. No. 7-95-11923 MA
Adv. No. 00-1091 M
Chapter 7

ORDER AND JUDGMENT*

DON D. BECKER; LINDA S. BLOOM;
TIM RIVERA; STEPHEN D. TURPEN;
RON KOCH; TOM UDALL; JULIE
ALTWISE; REBECCA E. WARDLAW;
Honorable RICHARD J. KNOWLES;
Honorable DIANE DAL SANTO;
ELIZABETH VINCILL; DIANE WEBB;
CHERYL RYERSON; ROSE ROYBAL;
DAN WASKO; NEWWEST
PROPERTY MANAGEMENT; FOX
EXECUTIVE OFFICES; CHESTER
FRENCH STEWART; WRIGHT MAINS
KOWSTER, INC., AGENCY;
CRESTVIEW FUNERAL HOME, INC.;
LARRY BARKER; PAUL LOGAN;
ALICE NYSTAL; KAREN A. INGLIS,
ASA; JACK YARMOLA;
ROXANNE BACA; DAVID GILPEN;
BARBARA C. EVERAGE; JEROME
MARSHAK,

Defendants.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before BOULDEN, MICHAEL, and BROWN¹, Bankruptcy Judges.

BOULDEN, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

John Lester Salazar (Salazar) appeals a Judgment entered by the United States Bankruptcy Court for the District of New Mexico in favor of James A. McCormick, the Chapter 7 trustee (“McCormick” or “Trustee”) of the debtor corporation, Crestview Funeral Home, Inc. (Debtor). For the reasons stated below, the Judgment is AFFIRMED.

I. Background

The Debtor owned and operated a funeral home. Salazar and his former spouse, Phyllis Ferguson Bekaert (Bekaert), were shareholders of the Debtor, and Salazar served as the Debtor’s president. During the course of the Debtor’s operations, it accepted money from customers to pre-pay their funeral expenses, commonly referred to as “Preneed Money.”

Salazar and Bekaert engaged in a divorce proceeding in New Mexico (Divorce Action). McCormick was appointed as Special Master by the court in the Divorce Action to determine whether the Debtor was viable as a going concern.

In 1995, while the Divorce Action was pending, Salazar caused the Debtor to file a Chapter 11 petition. Just prior to a plan confirmation hearing in 1997, the Debtor, Bekaert, and the United States trustee agreed that McCormick should be appointed as

¹ Honorable Elizabeth E. Brown, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Colorado, sitting by designation.

the Chapter 11 trustee in the Debtor's case.² The bankruptcy court approved this agreement, and denied confirmation of the Debtor's plan without prejudice. An "Application for Approval of Appointment of Trustee, James A. McCormick and Designation of Required Bond" was filed, and McCormick filed a "Notice of Acceptance of Appointment."³ The bankruptcy court then entered an Order approving McCormick's appointment as the Chapter 11 trustee (Order of Appointment). Several days later, a "Stipulated Order to Appoint one disinterested person to act as Chapter 11 Trustee" (Stipulated Order of Appointment) was entered by the court. Salazar did not object to the appointment of a Chapter 11 trustee, or to McCormick's appointment as the Trustee. Furthermore, he did not appeal the Order of Appointment or the Stipulated Order of Appointment.

After his appointment in 1997, the Trustee continued to operate the Debtor's funeral home business. But, in January 1998, he closed the business because he did not believe it was viable, and because he had discovered that several thousand dollars of Preneed Money was missing.⁴ Shortly thereafter, the Trustee moved to convert the Debtor's Chapter 11 case to Chapter 7. Several parties objected, but Salazar did not file an objection to the conversion motion. The bankruptcy court overruled the objections and granted the Trustee's motion, thus converting the Debtor's Chapter 11 case to Chapter 7 (Conversion Order).

Upon conversion, Bill Sholer was immediately named as interim trustee under 11

² The evidence strongly suggests that Salazar agreed to McCormick's appointment as the Chapter 11 trustee on behalf of the Debtor. Exhibit 121, *in* Appellee's Appendix at 321.

³ *See* Fed. R. Bankr. P. 2007.1(c) & 2008.

⁴ After the Debtor's business closed, Salazar pled guilty to criminal charges of fraud, embezzlement and forgery in connection with the missing Preneed Money. Salazar has served or is serving a sentence in a New Mexico correctional facility for these crimes.

U.S.C. § 701(a)(1).⁵ Several days later, a notice was served, setting a § 341 meeting of creditors and announcing the appointment of McCormick as Trustee. Prior to the § 341 meeting, a “Notice of Appointment of Successor Trustee, James A. McCormick” was entered, stating that Mr. Sholer’s involvement in the case was terminated. The § 341 meeting was then re-scheduled, and a notice of that meeting, as well as McCormick’s appointment as Trustee, was again served on creditors. Salazar objected to McCormick’s appointment (Salazar Objection), alleging without support, that McCormick had perjured himself and acted in concert with Bekaert in numerous bad acts, including extortion. McCormick responded to the Salazar Objection. The re-scheduled § 341 meeting was held, and trustee election report was filed after the meeting. Accordingly, McCormick became the Chapter 7 trustee.⁶

In July 1998, all of the property of the Debtor’s estate was sold at a court-approved auction (1998 Auction). AAAA Auction and its principal, Gary McCormick (collectively, “AAAA”), were the court-approved auctioneers for the 1998 Auction.

Salazar commenced the adversary proceeding at issue in this appeal against the Trustee, Bekaert, AAAA, and other defendants in May 2000.⁷ The bankruptcy court conducted a trial over several days, spanning from March 2002 to July 2002. At the conclusion of the trial, the only causes of action that remained for disposition were those seeking to hold the Trustee personally liable for damages related his actions in the Debtor’s case.⁸ Based on Salazar’s closing argument, the bankruptcy court ordered the

⁵ Unless otherwise stated, all future statutory references are to title 11 of the United States Code.

⁶ See 11 U.S.C. §§ 701(b) and 702(d).

⁷ Other than the defendants specifically mentioned, the bankruptcy court dismissed all other defendants from the adversary proceeding prior to trial.

⁸ After the close of evidence related to AAAA, the bankruptcy court entered its “Order Granting Motion for Directed Verdict or in the Alternative Motion to Dismiss of AAAA Auction.” *Salazar v. McCormick (In re Crestview Funeral Home, Inc.)*, 287 B.R. 832 (Bankr. D.N.M. 2002). Also, at some time prior to conclusion of the

(continued...)

Trustee to investigate insurance carried by the Debtor and the monies held in one of the Debtor's bank accounts. It then took the matter under advisement.

After the Trustee filed a "Trustee's Report to the Court on Insurance and Bank Account Search" (Trustee Report), the bankruptcy court entered a Memorandum Opinion and separate Judgment in his favor. In its Memorandum Opinion, the court discussed a bankruptcy trustee's personal liability and applied the following legal standard: "[A] trustee can be held personally liable only if the trustee willfully and deliberately violates his fiduciary duties."⁹ The bankruptcy court concluded that the Trustee was not personally liable for his acts in the Debtor's case, stating:

After reviewing each of the allegations, the Court finds that the Plaintiff has not proven that the Trustee acted negligently in any [of] his actions as trustee either in the Chapter 11 or in the Chapter 7 bankruptcy. Because Plaintiff failed to show that the Trustee was negligent, the Court necessarily concludes that the Trustee is not personally liable for any of his actions as trustee of the Debtor, which would require proof of willful and deliberate actions in violation of his fiduciary duty.¹⁰

Salazar filed a timely notice of appeal from the bankruptcy court's final Judgment, and the parties have consented to this Court's jurisdiction over this appeal.¹¹

II. Motion to Strike

The Trustee objects to thirteen papers contained in Salazar's Appendix, arguing that they should be stricken because they were not before the bankruptcy court. A list of the papers in question is contained in the Second Addendum to the Trustee's Brief. We construe the Trustee's objection as a "Motion to Strike" the listed items from the appellate record. Upon review of the record, the Motion to Strike is GRANTED, and

⁸ (...continued)

trial, the bankruptcy court entered an order granting Bekaert's motion for a directed verdict. Salazar appealed that order, and a Panel of this Court affirmed. *Salazar v. Bekaert (In re Crestview Funeral Home, Inc.)*, No. NM-02-046, 2002 WL 31794155 (10th Cir. BAP Dec. 13, 2002).

⁹ Memorandum Opinion at 5, *in* Appellant's Appendix, Vol. 1, at 96.

¹⁰ *Id.* at 7, *in* Appellant's Appendix, Vol. 1, at 98.

¹¹ 28 U.S.C. § 158(a)(1) & (c); Fed. R. Bankr. P. 8002.

the papers listed in the Trustee's Second Addendum are hereby stricken from the appellate record because they were not before the bankruptcy court.¹²

III. Discussion

This appeal does not involve the legal standard used to assess a trustee's personal liability for actions taken in a bankruptcy case because Salazar does not contest the law applied by the bankruptcy court in entering Judgment for the Trustee. Rather, he raises numerous points of error contesting procedural and evidentiary rulings made by the bankruptcy court prior to or during the trial. He also attacks certain of the bankruptcy court's factual findings supporting its Judgment. Prior to addressing the merits of Salazar's points of error, it is important to understand the applicable standard of review that we must employ.

A trial court's procedural and evidentiary rulings are reviewed for abuse of discretion.¹³ It is well-established that:

Under the abuse of discretion standard[] a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. When we apply the "abuse of discretion" standard, we defer to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value.¹⁴

A bankruptcy court's "[f]indings of fact, whether based on oral or documentary

¹² See, e.g., *Aero-Med., Inc. v. United States*, 23 F.3d 328, 329 n.2 (10th Cir. 1994); *Boone v. Carlsbad Bancorp., Inc.*, 972 F.2d 1545, 1549 n.1 (10th Cir. 1992).

¹³ See, e.g., *Reed v. Bennett*, 312 F.3d 1190, 1193 n.1 (10th Cir. 2002) (order denying motion to continue trial is reviewed for abuse of discretion); *Kirtley v. Sovereign Life Ins. Co. (In re Durability, Inc.)*, 212 F.3d 551, 555 (10th Cir. 2000) (the bankruptcy court's evidentiary rulings reviewed for abuse of discretion); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1433 (10th Cir. 1993) (evidentiary rulings generally reviewed for abuse of discretion); *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1514 (10th Cir. 1990) (refusal to reopen discovery period reviewed for abuse of discretion).

¹⁴ *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (citation and quotation omitted); see *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999) (abuse of discretion is "an arbitrary, capricious, whimsical, or manifestly unreasonable [judgment].") (quotation omitted).

evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.”¹⁵

“A finding of fact is ‘clearly erroneous’ if it is without factual support in the record or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made.”¹⁶

With this background, we now address each of Salazar’s points of error, concluding that the bankruptcy court must be affirmed. Our discussion groups the bankruptcy court’s rulings at issue on appeal as either procedural or factual in nature. Procedural rulings called into question by Salazar are discussed *infra* at ¶ A. Findings of fact contested by Salazar are analyzed *infra* at ¶ B. Paragraph C discusses issues raised by Salazar in conjunction with the Trustee Report.

A. The Bankruptcy Court Did Not Abuse Its Discretion As To Any Of Salazar’s Alleged Procedural Points Of Error.

Salazar maintains that certain of the bankruptcy court’s procedural rulings were an abuse of its discretion. Salazar raises many points of error in his Brief, and we have categorized them as follows: (1) denial of Salazar’s motions to continue the trial; (2) denial of Salazar’s motions to conduct additional discovery during trial; and (3) rulings related to certain police reports. Our discussion below concludes that none of these rulings were an abuse of discretion and, therefore, the bankruptcy court’s Judgment must be affirmed.

1. **The bankruptcy court did not abuse its discretion in denying Salazar’s motions to continue the trial.**

Salazar made several oral motions to continue the trial, but all were denied by the bankruptcy court. According to Salazar, if the trial had been continued, he would have

¹⁵ Fed. R. Bankr. P. 8013; *accord* Fed. R. Civ. P. 52(a); Fed. R. Bankr. P. 7052; *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

¹⁶ *Manning v. United States*, 146 F.3d 808, 812 (10th Cir. 1998) (quotation omitted); *accord* *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

been able (1) to conduct discovery related to sixty-two documents allegedly held by the Department of Justice (Justice Papers), (2) to present certain witnesses who were ill and unable to attend the trial, and (3) to conduct discovery related to the Trustee's alleged perjury in taking money from the bankruptcy court's registry. Our review of the of the record makes clear that the bankruptcy court did not abuse its discretion in denying Salazar's motions.

(i) Pretrial motion to continue to review Justice Papers.

Salazar requested a continuance prior to presenting evidence at trial (Pretrial Motion to Continue), claiming in part that the Department of Justice had improperly denied him access to the Justice Papers, which are allegedly important to his case. The bankruptcy court denied Salazar's Pretrial Motion to Continue, stating that everybody was present and ready to go.

We do not have a definite and firm conviction that the bankruptcy court erred in denying Salazar's Pretrial Motion to Continue and, in fact, our review of the record convinces us that the bankruptcy court properly denied the Motion. It was made on the date that the trial was scheduled to commence, and it is clear that Salazar knew of the issues related to the Justice Papers before trial, but failed to bring them to the court's attention until just prior to the start of the trial. Finally, to this date it is unclear what bearing the Justice Papers would have on Salazar's causes of action against the Trustee. Salazar has not timely itemized the documents sought, described them, or explained why they are important to his case against the Trustee.¹⁷

Salazar maintains that the bankruptcy court's failure to allow him to develop the record to include the Justice Papers was an abuse of discretion because: "The Supreme

¹⁷ On September 9, 2002, Salazar filed a "Motion to Compel the Department of Justice to Provide John L. Salazar with the Remaining Sixty-Two Documents in His File." Appellant's Appendix at 124(a). This Motion was filed approximately two months after the close of evidence in the trial, and just four days prior to the date that the bankruptcy court filed its Judgment. Accordingly, the Motion was not timely-presented to the bankruptcy court, and we have struck it from the appellate record. *See supra* ¶ II.

Court has held that ‘a decision based on an insufficiently developed record may and will be found to later be lacking in the thoroughness that should precede judgment.’ (See Kennedy vs. Silas Mason Co., 334 U.S. 249, 256-57 . . . (1984)).¹⁸ This statement pertains to a trial court’s failure to state its record based on the evidence presented to it. It has nothing to do with a trial court’s refusal to allow a continuance in a scheduled trial on the trial date to allow the plaintiff to further develop its case.

(ii) Pretrial motion to continue based on absent witnesses.

Salazar’s Pretrial Motion to Continue also was based on the fact that two of his witnesses were unavailable. Specifically, Salazar claimed that (1) alleged due process violations in the state prison prevented him from contacting witnesses to learn that they were unavailable, (2) a heart attack of Salazar’s witness Greg Costanza prevented him from appearing at the trial, and (3) Ms. Inglis, one of Salazar’s witnesses, had moved for a protective order, which prevented her appearance at trial. The bankruptcy court denied this portion of Salazar’s Pretrial Motion to Continue, stating that (1) the alleged due process violations did not involve the bankruptcy court, (2) it would consider not ruling on the trial until the absent witnesses were available, and (3) parties were present and ready to go forward with trial.

The bankruptcy court’s denial of the Pretrial Motion to Continue was not an abuse of discretion. The trial was scheduled, and numerous parties were present and ready to proceed. Salazar has never indicated what bearing these witnesses would have had on his case and, therefore, why their exclusion was improper. In addition, according to the record, Salazar never again referred to the witnesses in question at any later part of the trial. Indeed, another Panel of this Court, based on the same record, stated “[n]othing in the record on appeal indicates that Salazar mentioned any desire to

¹⁸ Appellant’s Brief at 25.

obtain the testimony of these two witnesses at any time after this [pretrial] exchange.”¹⁹

(iii) Motion to continue to discover Trustee’s perjury.

Salazar makes totally unsupported complaints that “[i]f the Court would have properly allowed Plaintiff a continuance; allowed proper discovery and in-camera inspection, there would have been additional evidence[.]” related to the Trustee’s perjury.²⁰ But, he does not tie these allegations to the record. Thus, it is impossible to know if he actually made a motion to continue before the bankruptcy court and, if made, the bankruptcy court’s reason for denying it. For this reason alone, we may summarily affirm the bankruptcy court.²¹

(iv) Mid-trial and after-trial motions to continue.

Salazar alleges briefly that he made motions to continue the trial both during and at the conclusion of trial, but that the motions were erroneously denied by the bankruptcy court. This argument will not be considered for two reasons. First, Salazar has not cited to the record to show where these alleged errors occurred. The bankruptcy court therefore must be affirmed on this basis alone.²² Second, Salazar has not argued about the impropriety of the bankruptcy court’s denial of these motions in his brief. Accordingly, the issue is deemed waived on appeal.²³

2. The bankruptcy court did not abuse its discretion in disallowing

¹⁹ *Crestview Funeral Home*, 2002 WL 31794155, at *2.

²⁰ Appellant’s Brief at 6, ¶ 12.

²¹ *See, e.g., United States v. Rodriguez-Aguirre*, 108 F.3d 1228, 1238 n.8 (10th Cir. 1997) (Appellants must tie the relevant facts to the legal contentions, and must provide essential references to the record to carry the burden of proving error); *Harolds Stores, Inc. v. Dillard Dep’t Stores, Inc.*, 82 F.3d 1533, 1540 n.3 (10th Cir. 1996) (Appellant must show the appellate court exactly where in the record the issue in question was raised and ruled on to avoid summary dismissal of its appeal); *SEC v. Thomas*, 956 F.2d 825, 827 (10th Cir. 1992) (the court will not “sift through” the record to find support for the Appellant’s arguments).

²² *See cases cited supra* note 21.

²³ *See, e.g., Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1231 (10th Cir. 1990) (an issue listed, but not argued in an Appellant’s brief is waived).

Salazar additional time to conduct discovery.

Salazar complains that the bankruptcy court erred in failing to allow him additional discovery prior to and during trial related to: (1) the collection of “new” evidence, including fifty-nine boxes of documents held by the Trustee, the Justice Papers, a deposition transcript, and information on a computer disc related to the Trustee’s bookkeeping practices; (2) whether the Trustee’s business practices were within the scope of New Mexico law; (3) whether the Trustee was adequately collecting accounts receivable; and (4) whether the Trustee acted in an unprofessional manner. For the reasons stated, the bankruptcy court did not abuse its discretion in denying Salazar’s requests for additional discovery.

One of the primary objectives of discovery is to obtain evidence to be used at trial. Thus, parties are expected to complete discovery *prior* to trial, so that they can present the information obtained therefrom as evidence at trial. A bankruptcy court’s refusal to allow discovery on the eve of, during, or at the close of trial will not be an abuse of discretion.

The record shows that Salazar’s requests to conduct additional discovery related to point (1) above, *i.e.*, the collection of “new evidence,” were made at the start, during, and at the close of trial. But, the record also indicates that discovery should have been completed by the parties by no later than February 2002. Salazar’s failure to timely conduct discovery could not be cured during the trial, and the bankruptcy court’s refusal to allow him additional discovery time was not an abuse of discretion.²⁴

As to Salazar’s discovery requests stated in (2)-(4) above, Salazar has failed to

²⁴ Salazar refers to a computer disc containing the Trustee’s bookkeeping information as “new evidence” that he wished to discover. The bankruptcy court did not deny Salazar the ability to conduct discovery from this disc. Rather, at the start of trial, Salazar informed the bankruptcy court that he had the disc, but that he had not had an opportunity to review it because he either could not get the disc in jail or that the jail would not let him use the disc. He made due process complaints about the jail’s failure to allow him access to the disc. The bankruptcy court stated that the due process issues were not properly raised with it, and that he could obtain the information on the disc at the lunch break.

direct the Court to the place in the record where he made his alleged discovery motions, or rulings of the bankruptcy court denying such motions. Without a record of a motion that was denied, it is impossible for the Court to review these issues, and the bankruptcy court must be summarily affirmed.²⁵ Even if the record had been properly referenced, however, we note that the bankruptcy court's rulings on points (2)-(4) would be appropriate for the same reasons stated above in relation to point (1).

3. The bankruptcy court did not err with regard to police reports.

Salazar maintains that the bankruptcy court abused its discretion by refusing to admit a police report into evidence, or by failing to acknowledge a report that was presented as material evidence against the Trustee. This argument is without merit for two reasons.

First, there is no citation to the trial transcript showing that the reports were presented for admission into evidence, that the bankruptcy court denied their admission, and its reasons for doing so. Accordingly, it is impossible to conduct appellate review of this point, and the bankruptcy court must, to the extent a ruling was made, be summarily affirmed.²⁶ Second, Salazar has not argued this point of error in his appellate Brief. His failure to provide any argument as to why the bankruptcy court erred is grounds for it being deemed waived.²⁷

B. The Bankruptcy Court's Factual Findings are not Clearly Erroneous.

Salazar argues that many of the bankruptcy court's factual determinations are clearly erroneous. These rulings may be grouped as follows: (1) the propriety of the Trustee's appointment; (2) the propriety of the Trustee's Chapter 11 business practices;

²⁵ See *supra* note 21; see also *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (appellate court will not consider issues not raised or ruled on below).

²⁶ See *supra* note 21.

²⁷ See *supra* note 23.

(3) the Trustee's handling of the Debtor's accounts receivable; and (4) the propriety of myriad Trustee actions, itemized in more detail below. For the reasons discussed, the bankruptcy court's factual determinations are not clearly erroneous and, therefore, its Judgment must be affirmed.

1. The propriety of the Trustee's appointment.

Salazar states that the bankruptcy court erred in determining that the Trustee was properly appointed and, therefore, that he had the authority to act on behalf of the estate. This argument is based on three points. First, he contests the appointment of a Chapter 11 trustee in the Debtor's case in general. Next, he questions the procedures that resulted in McCormick's designation as the Chapter 7 trustee. Finally, he maintains that McCormick was barred from serving as Trustee in the Debtor's case in light of his role as Special Master in the Divorce Action. Each point is discussed below.

(i) Chapter 11 appointment.

Salazar claims that there was a conflict of interest related to the appointment of a Chapter 11 trustee. This claim does not appear to be made against McCormick's appointment *per se*, but rather to the agreement to appoint a Chapter 11 trustee in the Debtor's case. Salazar contends that he had no choice but to agree to the appointment of a Chapter 11 trustee.

Even if Salazar had no choice in the appointment of a Chapter 11 trustee, the bankruptcy court did not err in failing to recognize this argument because it is not relevant to the Trustee's personal liability for actions in the case once he was appointed. Furthermore, this argument is an improper collateral attack of the Order of Appointment and Stipulated Order of Appointment, both of which are final orders under 28 U.S.C. § 158(a)(1).

(ii) Chapter 7 appointment.

Salazar argues that the Trustee was not properly appointed in the Debtor's Chapter 7 case because Salazar "was never Noticed by the Trustee of the conversion

from Chapter 11 to Chapter 7, making the [Conversion Order] Null and Void.”²⁸ He also states: “To date, the Bankruptcy Court has never placed an Order to allow the Trustee to remain as Trustee pursuant to his Motion to Remain as Trustee. This leaves doubt as to his Legal Authorization as the Trustee for this Estate.”²⁹ Both of these arguments are without merit.

Salazar did not object to the Conversion Order prior to its entry by the bankruptcy court. He has therefore waived his right to do so, unless he can prove that the Conversion Order must be set aside under Federal Rule of Bankruptcy Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024. But, a Rule 60(b) motion must be made in the bankruptcy court in the first instance. Thus, we cannot review Salazar’s attack on the Conversion Order, which is a final order under 28 U.S.C. § 158(a)(1).³⁰

In addition, McCormick was appropriately designated as the Chapter 7 trustee in the Debtor’s case. McCormick was named successor interim Chapter 7 trustee upon conversion of the Debtor’s case by the notice served on creditors. As the interim trustee, McCormick automatically became the permanent trustee, absent a trustee election under § 702.³¹ No election took place³² and, therefore, McCormick’s appointment by the United States trustee was his appointment as the permanent trustee in the Debtor’s Chapter 7 case.³³

(iii) The Trustee’s service as Special Master in the Divorce

²⁸ Appellant’s Brief at 11, ¶ 5.

²⁹ *Id.* at 12, ¶ 13.

³⁰ The Conversion Order can no longer be appealed because it became final within ten days of its entry in 1998. 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a); *In re Vista Foods U.S.A., Inc.*, 202 B.R. 499, 500 (10th Cir. BAP 1996) (per curiam) (order of conversion is a “final” order under 28 U.S.C. § 158(a)(1)).

³¹ *See* 11 U.S.C. § 702(d).

³² The Salazar Objection was not a proper election because, as an insider of the Debtor, Salazar was not qualified to vote at an election *Id.* § 702(a)(3).

³³ *See id.* §§ 701(b) & 702(d).

Action.

Salazar contends that McCormick was not eligible to serve as Trustee in the Debtor's case due to his prior appointment as a Special Master in the Divorce Action, and that as a Special Master, he developed a disqualifying relationship with Bekaert similar to an attorney-client relationship. Allegedly, the Trustee, acting on behalf of Bekaert, threatened Salazar to derail the Debtor's reorganization attempts to obtain a cash settlement for Bekaert. Because of the Trustee's relationship with Bekaert, he also failed to recover monies that Bekaert allegedly misappropriated from the Debtor. These arguments are without merit.

The Trustee's role as Special Master in the Divorce Action between Salazar and Bekaert did not *per se* bar his appointment as Trustee in the Debtor's Chapter 11 or Chapter 7 case. Section 321 states that a proposed trustee must be "competent to perform."³⁴ Section 1104 states that an elected trustee must be a "disinterested person," and this standard presumably applies to individuals appointed without election.³⁵ Federal Rule of Bankruptcy Procedure 5002(b) provides that a bankruptcy judge may not approve the appointment of a person as a Chapter 11 trustee if the person is or has been connected with the judge or the United States trustee. And, § 701(a)(1) requires that a designated or elected Chapter 7 trustee must be a "disinterested person." Section 101(14) defines a "disinterested person" to include a person with no "interest materially adverse to the interest of the estate or of any class of creditors or equity security holders . . . for any . . . reason."³⁶

Under these provisions, McCormick was not automatically barred from appointment as Trustee, and based on the facts of the case the bankruptcy court did not err in concluding that the Trustee's service as Special Master in the Divorce Action did

³⁴ 11 U.S.C. § 321(a)(1).

³⁵ *Id.* § 1104(b).

³⁶ *Id.* § 101(14).

not make him a non-disinterested person who was barred from appointment. His role as a Special Master did not create an interest materially adverse to the interests of the estate, any class of creditors, or even Salazar. In fact, the Trustee's Special Master duties in the Divorce Action were limited to evaluating the viability of the Debtor corporation, and the state court expressly instructed him not to determine ownership interests in the Debtor disputed by Salazar and Bekaert. Salazar's allegations related to the Trustee's bias and his relationship with Bekaert are not in any way supported by the record.

The factual allegations on which Salazar relies would have been known to him prior to the entry of the Order of Appointment and Stipulated Order of Appointment. Yet, Salazar never attempted to contest the appointment of a trustee, he has never sought to set the Order of Appointment or the Stipulated Order of Appointment aside, and he did not timely appeal the Orders. As such, his arguments related to the Trustee's disinterestedness, raised for the first time in an adversary proceeding filed nearly three years after these Orders were entered, are an improper collateral attack of the final Orders.

2. The propriety of the Trustee's Chapter 11 business practices.

Salazar argues that the Trustee instituted illegal business practices under New Mexico law when he operated the Debtor's business in Chapter 11. In particular, he did not segregate Preneed Money in separate accounts, but rather allowed it to be commingled in the Debtor's general accounts. Salazar also alleges that the Trustee embezzled Preneed Money. Salazar and his son, Chris Salazar, testified in support of these allegations, but no other corroborating evidence was presented.

The bankruptcy court considered the Trustee's testimony and the testimony of Salazar and his son, and decided that the Trustee's testimony was more credible. In

fact, the court found Salazar and his son's testimony to be "unbelievable."³⁷ This conclusion, made after an observation of the witnesses, is entitled to deference and, therefore, is not clearly erroneous.³⁸

3. The Trustee's handling of the Debtor's accounts receivable.

Salazar alleges that the Trustee did not adequately attempt to collect on numerous of the Debtor's accounts receivable because he had a conflict of interest as the owner of a collection business. The bankruptcy court dismissed these arguments, viewing as credible the Trustee's testimony that many accounts were not worth pursuing and were uncollectible. It further stated that Salazar "did not present any credible evidence showing that the Trustee acted improperly with regard to collection of accounts receivable."³⁹

On appeal, Salazar summarily states that "[t]here was credible testimony and exhibits presented at Trial."⁴⁰ He also states that he can "show case law and fact to support that the Court made it's [sic] determination by Clear and Plain Error and abused it's [sic] discretion on this issue also."⁴¹ These arguments are without merit because Salazar has failed to indicate where in the record this supposed credible testimony exists, and he has failed to present any legal argument on this point of error.⁴²

4. The propriety of various Trustee actions.

Salazar finds fault with many of the Trustee's actions. His complaints and the bankruptcy court's rulings related to each are summarized as follows.

Salazar claims that the Trustee improperly demanded that he pay the Debtor's

³⁷ Memorandum Opinion at 11, *in* Appellant's Appendix at 102.

³⁸ *See supra* note 16.

³⁹ Memorandum Opinion at 12, *in* Appellant's Appendix at 103.

⁴⁰ Appellant's Brief at 4, ¶ 8.

⁴¹ *Id.* at 4-5.

⁴² *See supra* notes 21 & 23.

rent, and threatened to close the Debtor's business if he did not do so. The bankruptcy court concluded that the Trustee had not acted improperly because he obtained a order authorizing the rent payments, and his testimony related to the transaction was credible.

Next, Salazar maintains that the Trustee's audit of the Preneed Money was not comprehensive and, if it had been, he would have discovered that Bekaert, and possibly others, had embezzled Preneed Money. The bankruptcy court rejected this argument, citing as credible the Trustee's testimony that Salazar, not Bekaert or any other person, had taken the Preneed Money. The Trustee properly referred criminal matters to the United States trustee for further investigation, and Salazar had not presented any evidence to rebut the Trustee's credible evidence.

Salazar also states that the Trustee improperly closed the Debtor's business. The bankruptcy court dismissed this argument, finding that the Trustee's reasons for closing the business were well-documented, and his testimony on this point was credible.

Improprieties related to the 1998 Auction are also cited by Salazar. He claims that the Trustee knowingly allowed AAAA's employees to bid on items, and that he sold property that was not property of the Debtor's estate. While the bankruptcy court found problems with the 1998 Auction, as reflected in its denial of fees to AAAA,⁴³ it nonetheless rejected this argument, stating that it accepted the Trustee's testimony that he did not knowingly cause the improprieties.

In addition, Salazar argues that the Trustee fraudulently obtained authorization to employ an accounting firm by misrepresenting that no objection thereto had been made because his father had filed an objection. The bankruptcy court rejected this argument, stating that no objection had been filed. It also held that Salazar had not presented any evidence that his father's objection was illegally expunged from the court's docket. A review of the record shows that these findings are correct, and therefore, are not clearly

⁴³ See *Crestview Funeral Home*, 287 B.R. at 838-39.

erroneous.⁴⁴

Salazar claims that the Trustee converted the Debtor's Chapter 11 case to Chapter 7. The bankruptcy court dismissed this argument, stating that Salazar had not objected to conversion or appealed the Conversion Order. It also held that the Trustee acted well within his business judgment in seeking conversion.

Finally, Salazar and his son testified as to the Trustee's unprofessional behavior in operating the Debtor's business. The bankruptcy court rejected this testimony, stating that it was "unbelievable."⁴⁵

We have thoroughly reviewed the record on each of these claims. Our review has convinced us that the bankruptcy court's findings of fact are accurate and not clearly erroneous.

C. Issues Related To The Trustee Report.

At the bankruptcy court's request, the Trustee filed the post-trial Trustee Report. Salazar complains on appeal that the Trustee breached his fiduciary duties because he was expressly ordered to file a report, and the Trustee Report is incomplete. According to Salazar, the alleged incomplete Trustee Report is a "discovery" violation.⁴⁶

Salazar filed a motion to strike the Trustee Report and a motion seeking approval to object to the Trustee Report in the bankruptcy court after the Judgment was entered.⁴⁷ We have no record, however, showing that the bankruptcy court disposed of

⁴⁴ The objection supposedly filed by Salazar's father is included in Salazar's Appendix, but we have stricken it from the record. *See supra* ¶ II. However it is worth noting that the paper included in the Appendix does not contain the court's date-stamp and, therefore, it does not prove that it was filed.

⁴⁵ Memorandum Opinion at 21, *in* Appellant's Appendix at 112. Salazar and his son's allegations related to the Trustee's unprofessional behavior, even if true, would not be grounds for holding the Trustee personally liable under either legal standard discussed by the bankruptcy court.

⁴⁶ Appellant's Brief at 7, ¶ 16.

⁴⁷ These motions are not the type of motions that tolled the time to appeal the bankruptcy court's final Judgment. *See* Fed. R. Bankr. P. 8002(b).

these motions, and if it has, Salazar has not supplemented the record to include the court's order. As a result, we are not able to address this argument.⁴⁸

We note that the bankruptcy court required the Trustee to investigate issues related to the Debtor's insurance and bank account based solely on arguments made by Salazar for the first time at the close of trial.⁴⁹ Salazar presented no evidence related to the Trustee's alleged failure to investigate these matters in attempting to prove the Trustee's personal liability in the Debtor's case.

IV. Conclusion

For the reasons stated above, the bankruptcy court is AFFIRMED.

⁴⁸ See *supra* notes 21 & 23; see generally *McEwen v. City of Norman*, 926 F.2d 1539, 1550 (10th Cir. 1991) (Appellant has duty to provide the appellate court with a sufficient record for review).

⁴⁹ See Transcript dated July 17, 2002 at 1404, *in* Appellee's Appendix at 829.